Supreme Court, U. S.
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NO. 77-1164

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1977

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DR. N. JAY ROGERS, O.D. and W. J. DICKINSON,
Individually and as President of the TEXAS
SENIOR CITIZENS ASSOCIATION, PORT ARTHUR,
TEXAS CHAPTER,

Appellants

V.

DR. E. RICHARD FRIEDMAN, O.D., DR. JOHN B.
BOWEN, O.D., DR. HUGH A. STICKSEL, JR., O.D.
DR. JOHN W. DAVIS, O.D., DR. SAL MORA, O.D.,
Individually and in their official capacity as members of
THE TEXAS OPTOMETRIC BOARD; and
THE TEXAS OPTOMETRIC ASSOCIATION, INC.,

Appellees

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ON APPEAL FROM A THREE-JUDGE COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

---

# MOTION TO AFFIRM OR DISMISS
FILED BY APPELLEE
TEXAS OPTOMETRIC ASSOCIATION, INC.

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March 20, 1978

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MOTION TO AFFIRM OR DISMISS
FILED BY APPELLEE
TEXAS OPTOMETRIC ASSOCIATION, INC.

---

**Motion to Dismiss or Affirm**

Appellee, Texas Optometric Association, Inc., moves to dismiss this appeal or affirm the lower court's judg-

ment with respect to this appeal for the reason that the questions presented are so insubstantial as not to need further argument.

## Opinion Below

The opinion of the United States Three-Judge District Court for the Eastern District of Texas is reported at 438 F. Supp. 428. The opinion and judgment are reproduced in appellants' Jurisdictional Statement.

## Jurisdiction

The jurisdictional requisites are adequately set out in Appellants' Jurisdictional Statement.

## Questions Presented

I. Whether the Three-Judge Federal Court erred in determining that §2.02 of the Texas Optometry Act has a rational basis and does not deprive Appellant Rogers of equal protection of the laws.

II. Whether the Three-Judge Federal Court erred in determining that §2.02 does not deprive Appellant Rogers of due process of law.

III. Whether the Three-Judge Federal Court erred in determining that §2.02 does not infringe upon Ap-

pellant Texas Senior Citizen Association's First Amendment rights to receive commercial information.

## Statute Involved

The court below declared that §2.02 of the Texas Optometry Act, Article 4552 of the Revised Civil Statutes of Texas, was constitutional. The statute reads as follows:

> Article 4552, §2.02. To be qualified for appointment as a member of the [Texas Optometry] board, a person must be a licensed optometrist who has been a resident of this state actually engaged in the practice of optometry in this state for the period of five years immediately preceding his appointment. A person is disqualified from appointment to the board if he is a member of the faculty of any college of optometry, if he is an agent of any wholesale optical company, or if he has a financial interest in any such college or company. At all times there shall be a minimum of two-thirds of the board who are members of a state optometric association which is recognized by and affiliated with the American Optometric Association.

## Statement of the Case

On August 25, 1975, Appellant, Dr. Rogers, who is a member of the Texas Optometry Board, brought this case against the remaining five members of the Texas Optometry Board. In his suit, Dr. Rogers challenged

§2.02 and various other sections of the Texas Optometry Act as being unconstitutional and sought to enjoin their enforcement. Section 2.02, which is the statute at issue in this appeal, was challenged as being an arbitrary classification in violation of Dr. Rogers' Fourteenth Amendment rights to equal protection and due process. A three-judge court was convened to consider this case.

On June 11, 1976, W. J. Dickinson, individually and as President of the Texas Senior Citizens Association, Port Arthur, Texas Chapter intervened and asserted that §2.02 violated Senior Citizens' First Amendment rights. Mr. Dickinson and his association will hereinafter be referred to as "Senior Citizens".

On September 13, 1976, the Texas Optometric Association, Inc., intervened in support of the Texas Optometry Board members and in support of the constitutionality of §2.02.

On October 27, 1977, the three-judge court entered its final judgment holding that §2.02 does not violate the First or the Fourteenth Amendments of the United States Constitution and denied injunctive relief. From this holding Dr. Rogers and Senior Citizens have appealed.

## Summary of Argument

*Equal protection.* The three-judge court below was correct in holding that Section 2.02 does not violate Dr. Rogers' constitutional right to equal protection. The court properly applied the rational basis test which dic-

tates that where the legislature could have had a rational basis for creating a classification in matters of economic regulation, the courts will defer to the legislative determination and allow the statute to stand. The lower court concluded that there were several different rational reasons for the statutory requirement of §2.02 which requires that four of the six members of the Texas Optometry Board belong to the Texas Optometric Association (TOA). Those rational bases were as follows:

(1) There is ample evidence to indicate that TOA members are more likely than non-TOA members to be economically independent;

(2) There is ample evidence to indicate that TOA members are more likely than non-TOA members to emphasize the highest quality of eye care; and

(3) There is ample evidence to indicate that TOA members are more likely than non-TOA members to enforce the Texas optometry law.

It is only necessary to show that the legislature *might* have had these reasons for enacting §2.02; but in this case, the rational reasons are even stronger because there is evidence that the legislature was *actually aware* of these rational bases for §2.02.

Having determined that §2.02 did have a rational basis, the lower court correctly determined that §2.02 was not unconstitutional on equal protection grounds.

*Freedom of speech.* In Dr. Rogers' Jurisdictional Statement to this Court, he asserts for the first time that

§2.02 is an unconstitutional violation of his first amendment rights to freedom of speech and association. However, Dr. Rogers, who is himself a member of the Texas Optometry Board, has not shown that his free speech or associational rights have been significantly impaired by §2.02. His assertion that TOA members on the Board might harass advertising optometrists and might thereby have a chilling effect on his right to advertise, is highly speculative and not substantial enough to warrant this Court's consideration.

*Substantive due process.* The court below was correct in determining that §2.02 does not violate Dr. Rogers' right to substantive due process. The court properly determined that the rational basis analysis (rather than an irrebuttable presumption analysis) governs the constitutionality of §2.02 on substantive due process grounds. Since §2.02 was found to have a rational basis, the court correctly held that §2.02 does not violate substantive due process. Furthermore, the court determined that even if an irrebuttable presumption analysis were applied, §2.02 does not conclusively and irrebuttably deny a board seat to anyone, much less Dr. Rogers who is on the Texas Optometry Board.

*Procedural due process.* The court below correctly overruled Dr. Rogers' procedural due process contention that TOA members are inherently biased and that §2.02 is therefore unconstitutional on procedural due process grounds. Dr. Rogers is incorrect in asserting that every optometrist who belongs to TOA must be presumed biased and that §2.02 therefore creates an inherently biased board. Bias cannot be constructively

presumed. Instead, it must be actually proven on a case-by-case basis. Since this lawsuit did not arise out of an adjudicatory proceeding, it therefore does not deal with questions of actual bias. It deals only with the possibility of bias in some future case where the parties are yet unknown. The three-judge court below correctly concluded that §2.02 should not be struck down merely because there *might* be bias in some future case. Section 2.02 does not violate Dr. Rogers' procedural due process rights.

*Mootness of Senior Citizens' challenge.* Appellant Senior Citizens asserts that §2.02 violates its first amendment right to receive price information through advertising. The court below properly concluded that since the Texas law prohibiting price advertising by optometrists has been declared unconstitutional and since the Optometry Board has been enjoined from enforcing it, Senior Citizens' challenge on §2.02 is mooted.

## Arguments and Authorities

I. THE THREE-JUDGE FEDERAL COURT CORRECTLY HELD THAT §2.02 OF THE TEXAS OPTOMETRY ACT HAS A RATIONAL BASIS AND THEREFORE DOES NOT DEPRIVE APPELLANT ROGERS OF EQUAL PROTECTION OF THE LAWS.

A. *Basis of challenge by Dr. Rogers.* In the court below, Dr. Rogers challenged the constitutionality of §2.02, alleging that it created an arbitrary classification of optometrists and thereby deprived him of equal pro-

tection under the law.

B. *Findings in the court below.* The three-judge court which heard this matter correctly determined that §2.02 was founded on a rational basis and therefore does not violate the equal protection clause. Citing *New Orleans v. Dukes* 427 U.S. 297 (1976), the court noted that when local economic regulation is challenged as violating the equal protection clause, the court shall defer to legislative determination. The court correctly stated that a statutory determinination will not be set aside if any state of facts might be conceived to justify it, *McGowan v. Maryland* 366 U.S. 420 (1961), and that the burden is on the one attacking the statute to negative every conceivable basis which might support it, *Madden v. Kentucky,* 309 U.S. 83 (1940).

Applying these standards, the court determined that §2.02 was founded on a rational basis, specifically mentioning three rational reasons for the legislative requirement that the majority of the Optometry Board be composed of TOA members:

(1) TOA members are more likely to be economically independent than non-TOA members,

(2) TOA members have a greater likelihood of emphasizing the highest quality of eye care, as compared to non-TOA members; and

(3) TOA members are more prone to enforce the Texas Optometry Act than non-TOA members.

Having determined that the legislature might have had these rational reasons for enacting §2.02, the court

properly deferred to the legislature and held §2.02 constitutional. *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955).

In the lower court proceeding, extensive evidence was presented through numerous and lengthly depositions which traced the histories of the Texas optometry profession, the Texas Optometry Board, the Texas Optometric Association, and the long-standing conflict between commercial and professional optometrists. On the basis of these depositions, the court properly concluded that the Texas Legislature indeed had rational reasons for enacting §2.02, and such reasons were not sufficiently negated by the Appellant.

C. *Analysis of the rational reasons for* §2.02.

1. *Professional vs. commercial optometry.* Prepatory to a discussion of the rationale for the statute, it would be helpful to briefly discuss the difference between "professional optometry" and "commercial optometry". Their general meaning is set forth in the deposition of Dr. James J. Riley, past president of TOA.

Generally, "professional" optometry includes those practitioners who are independent and whose historical emphasis has been high quality eye care. More specifically, "professional" optometry embodies a number of concepts which go beyond the minimum requirements of the law. These characteristics include: economic independence from outside control by opticians or department stores, a greater emphasis on continuing education, a greater emphasis on sufficient length for

examination time, examination by appointment rather than a wait-in-line method, gaining patients by professional reputation rather than advertising, and no direct or indirect tie-ins with opticians. (Dr. Riley, 8-17). *The membership of the Texas Optometric Association is comprised solely of professional optometrists.* (Dr. Riley, 31-34).

In contrast, "commercial" optometry includes the optometrists associated with the optical chains such as Texas State Optical (TSO) and Lee Optical. "Commercial" optometry is characterized by a particular mode of practice which emphasizes volume, speed, trade name practice and advertising. It is further characterized by: influence or control of the optometrist by outside interests; tie-ins with opticians; employment or partnership contracts that inhibit professional independence and professional judgment; speed of examinations; high volume of examinations to pay advertising and overhead expenses; less emphasis on continuing education; and less emphasis on law enforcement of optometry statutes. The Texas Association of Optometrists (TAO)[1] is comprised mostly of optometrists in commercial optometry, although a few professional optometrists are members of both TOA and TAO. (Dr. Riley, 17-25).

With this understanding of the difference between commercial and professional optometrists, and with the understanding that TOA is comprised solely of professional optometrists, it is appropriate to proceed with an analysis of the rational reasons for §2.02.

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[1]Not to be confused with T.O.A., Appellee herein.

2. *The first rational basis is that TOA members are more likely than non-TOA members to be econo-ically independent.* The first rational basis for §2.02 centers around economic independence. Obviously, there is a legitimate state interest in having Optometry Board members who are "their own boss" and who are not dominated or controlled by others. The danger of a lack of economic independence increases significantly when a Board member has financial ties to opticians which may preclude his economic independence and which may interfere with his enforcement of the law as a Board member (Dr. Riley, 11).

The evil that the Legislature sought to avoid in §2.02 was domination of the Board by owners of opticianries or optometrists who were employees of opticians or who were controlled by opticians through various financial ties. These types of control (and the dangers inherent in them) were in fact communicated to the members of the legislature in 1969 by TOA optometrists who were from the home districts of the legislators. (Dr. Riley, 80-101).

The Legislature justifiably assumed that one who was employed and controlled by another would be reluctant to "buck his boss" when it comes to enforcing the Optometry Act or voting a certain way as a member of the Optometry Board.

a. *The McGuire contract and the Moore contract.* The potential for domination of a Board member by opticians is exemplified by two exhibits, to wit: Dr. Rogers' contract for sale of a TSO office to Dr. Richard P. McGuire; and Dr. Rogers' contract of employment with Dr. Roy S. Moore. (Exhibits to depositions of Dr.

Riley and Dr. Rogers.) Obviously, the ultimate control over an optometrist is the threat of termination of employment. However, the control exercised over optical chain optometrists is much more extensive than the mere threat of loss of livelihood.

An optician's domination over an optometrist who is an employee or a partner in an optical chain or who is purchasing an optical chain office, destroys any vestige of economic independence of such optometrist. A review of the McGuire and Moore contracts raises real questions of how independent such an optometrist would be if he were appointed to the Optometry Board. *Would he be free from fear of repercussions by the owner of the optical chain?*

The answer is found in the myriad of controls exerted in the "partnership" portion of the McGuire contract:

(1) The optometrist *must* devote full-time to the practice; *must* be present every working day of the year except two weeks' vacation; *must* be there during the two weeks' vacation if there are no substitute personnel available.

(2) The firm of Rogers Brothers *must* be retained, at a fee of 4% of net cash, for advice and supervisory services of accounting, advertising, programming, window display, etc.

(3) The optometrist *must* abide by Rogers Brothers rules, regulations, and policies for the management of the office, including policies concerning examination of patients, progress examinations,

re-examinations, and all other policies regarding contact lenses, transfer patients, patients from other TSO offices. Such rules are determined solely by Rogers Brothers.

(4) All inventory and supplies *must* be purchased from Rogers Brothers, including all optical material of every nature such as frames, lenses, contact lenses, all prescription work, ophthalmic supplies, refracting equipment, and other optical supplies.

(5) All optical laboratory work *must* be done and purchased from Rogers Brothers laboratories.

(6) The optometrist *must* terminate the use of the TSO name if the partnership terminates *for any reason.*

(7) Rogers Brothers can terminate the contract upon misconduct or breach of contract by the optometrist. Misconduct is defined as including "consistent and willful refusal to follow management policies and procedures after receipt of written notice setting forth such deficiencies."

(8) The resident optometrist *must* covenant not to compete within three miles for a 10 year period in the event of the partnership being dissolved (for reasons other than sale).

In the event Dr. Rogers sells the entire local TSO office to the optometrist, very similar controls are imposed on the optometrist. Bear in mind that the following controls continue, ad infinitim, as long as the local

office utilizes the TSO name.[2] Those controls provide that:

(1) Daily sales reports *must* be submitted to the Beaumont, Texas office of Dr. Rogers.

(2) The resident optometrist *must* purchase all optical material, frames, lenses, contact lenses, or prescription work, ophthalmic supplies, refracting equipment and other optical supplies from Rogers Brothers laboratory.

(3) The optometrist *must* abide by Rogers Brothers rules and policies covering the optometrist's hours of operation, personnel procedures, professional fees, and pricing of eyeglasses and other optical materials. Rogers Brothers controls and dictates policies covering examination of patients; progress examination; re-examination; and all other policies including the care and continued care of contact lens patients and transfer patients from other TSO offices.

(4) Dr. Rogers can impose a $50 per day fine, or terminate the contract, and prevent the use of the TSO name if the resident doctor fails to abide by Rogers Brothers rules and policies.

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[2]The control is so extensive that it was the basis of an antitrust lawsuit by Dr. McGuire against Rogers Brothers. A certified copy of the federal court complaint is an exhibit in this case.

(5) The optometrist *must* purchase all his insurance including general liability, workman's compensation, professional liability, fire, hospitalization, and other casualty coverage from a broker designated by Rogers Brothers.

(6) The optometrist *must* use Rogers Brothers' prescriptions forms.

(7) The resident optometrist *must* not compete within certain areas for a period of 5 years from the date their relationship is terminated.

(8) The optometrist *must* be a member of Rogers Brothers pension plan and various benefit programs such as hospitalization insurance and disability insurance.

(9) The optometrist *must* participate in TSO advertising, prorata, in accordance with gross receipts. There is no ceiling on the dollar amount or percentage amount which must be contributed to TSO advertising other than the foregoing.

Various other kinds of economic controls and tie-ins are possible and/or prevalent in commercial optometry. These other types encompass: leasing space or equipment to an optometrist who offices next door to the opticianry; referring patients from the optician to the optometrist; and contracts requiring exclusive use of laboratories. (Dr. Riley, 12, 19, 23).

b. *Dr. Shannon's Testimony.* Dr. Robert Shannon, who was a former owner of the Lee Optical chain

in Texas, candidly admitted that when he was part owner of the chain, Lee Optical controlled the optometrists employed by them, top side and bottom. He further stated that if one of his Lee Optical optometrists had been a member of the state optometry board, his votes and actions would certainly have been constrained by the fear of being fired if he displeased the owners of Lee Optical. (Dr. Shannon, 9-21, 80-81). The entire deposition of Dr. Shannon is repleat with examples of how optometrists who were with Lee Optical in Texas were under the complete control and dominance of the owners of the Lee Optical chain. Dr. Shannon's deposition exposes the hard facts upon which the 1969 Texas Legislature could have relied in requiring that four TOA members be on the Optometry Board. (Dr. Shannon, 9-12, 15, 17, 22, 33-38).

c. *Federal judge analogy.* A vivid analogy might easily be made between the requirements of the Texas Optometry Act and the constitutional requirement that all federal judges have life tenure. It cannot be said with certainty that a particular judge would be a better or worse judge if he did or did not have life tenure. However, it was the intent of the Constitution that federal judges be granted the utmost in economic independence in order that their judgments and enforcement of the law be free from dominance or control by the Congress, the President, or the electorate. By analogy, one of the primary purposes of the Optometry Board is to enforce the law. And, as in the case of federal judges, such enforcement can best be accomplished in an atmosphere of economic independence where there is minimal chance of economic repercus-

sions for unpopular decisions and strict enforcement. (Dr. Riley, 100-102).

In the light of the economic controls traditionally exerted on commercial optometrists, the Legislature might rationally conclude that TOA members are more likely than the non-TOA members to be economically independent and free from outside control. As such, the Legislature had a rational basis for enacting §2.02.

3. *The second rational basis is that TOA members are more likely than non-TOA members to emphasize the highest quality eye care.* There is concrete evidence of legislative awareness of the need for Board members whose primary concern was *quality eye care* rather than high volume and high speed eye care. (Dr. Riley, 78, 95-101).

Because of the track record of TOA and the TOA Code of Practice[3], it is reasonable to believe that TOA members are more likely (as compared to non-TOA members) to emphasize higher standards and higher quality in eye care. The reasons for this greater probability are summarized in the deposition testimony of Dr. James J. Riley (a former president of TOA), Dr. Nelson Waldman (a former state board member and former TOA president), Dr. Robert Shannon (a former commercialist and owner of the Lee Optical chain), and Dr. Chester Pheiffer (Dean of the College of Optometry at the University of Houston).

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[3]An exhibit to the deposition of Stanley Boysen, Executive Director of TOA.

Their testimony can be summarized as follows:

a. *Gaining patients by reputation.* TOA members gain their patients primarily by their professional reputation for competence rather than by advertising or solicitation by opticians. A TOA member's calling card is "competence" and not the "Madison Avenue advertising agent." (Dr. Riley, 10-11; Dr. Waldman, 5; Dr. Shannon, 22).

b. *Properly equipped offices.* TOA membership is a general assurance of properly equipped offices and adherence to the provisions set forth in the TOA code of practice. (Dr. Riley, 9, 148-152).

c. *Continuing education.* TOA membership meant and still does mean an emphasis on continuing education. TOA fought hard for the creation of the Optometry College at the University of Houston (Dr. Riley, 14, 104) and was primarily responsible for the passage of a bill to make continuing education mandatory for license renewal (Dr. Riley, 14, 15-24). Before the passage of the continuing education statute, TOA was active in continuing educational seminars in regional and statewide conventions (Dr. Riley, 14).

In contrast, it was the testimony of Dr. Rogers that he personally opposed the continuing education law and that it was his intention to encourage the Texas Association of Optometrists (primarily composed of commercial optometrists) to challenge the statute in court as being unconstitutional (Dr. Rogers, 247). Sure enough, several weeks after Dr. Rogers made this statement during his deposition, the Texas Association of Optome-

trists filed suit to challenge the constitutionality of that statute.

d. *Length of time for examinations.* TOA members emphasize allowing a sufficient length of time for examinations, whereas the emphasis of the commercial optometrists was on greater volume and speed which nurtures lower quality eye care (Dr. Riley, 9, 18; Dr. Waldman, 43-44, 16-30).

TOA members emphasize more thorough and lengthy examinations for the benefit of the patient. The basic competence requirement takes at least 20 and probably 30 minutes. But the average TOA optometrist probably spends 30 to 45 minutes on the routine patient (Dr. Waldman, 43-44; Dr. Shannon, 35). In contrast, commercial optometry has historically emphasized speed and volume, resulting in greater danger of the examinations being less thorough and accurate (Dr. Waldman, 6-7). In fact, there are examples where the examinations have been much shorter, sometimes as short as eight or ten minutes (Dr. Riley, 18; Dr. Shannon, 33-38).

e. *Appointment rather than waiting in line.* TOA members practice by appointment rather than by a wait-in-line method utilized by commercial optometry (Dr. Shannon, 13-14). The appointment method encourages a more professional examination since it does not place the optometrist under the gun of losing patients who are waiting in the lobby. The professional optometrist is more free to allocate sufficient time for examinations since they are by appointment; and if an unanticipated problem arises, he is in a less perilous situation if he spills over into the next appointment or asks the patient to come back (Dr. Riley, 9, 18).

In contrast, in a commercial practice, the no-appointment/wait-in-line method encourages and forces the optometrist to speed up an examination for fear of losing a multitude of patients waiting in line in the lobby (Dr. Riley, 18). He is under additional pressure because of the advertising implication by the opticianry next door that no appointments are necessary.

f. *Dangers from pressures of high volume.* TOA members are not under the pressures of high volume in contrast to commercial optometrists. When optometrists are under pressure to turn out high volumes of patients, there is a tendency for shortcutting or eliminating important aspects of the examination. This can be very harmful to the patient in many ways.

This proposition was covered in great detail in the deposition of Dr. Nelson Waldman, who was formerly chairman of the Optometry Board and whose opinion is based on numerous investigations and hearings on basic competence violations by optometrists. Dr. Waldman in his deposition thoroughly discussed the steps in an optometric exam, in layman's terms, and pointed out the dangers of exams done in haste for high volume purposes (Dr. Waldman, 6, 7, 16-30, 75-76).

g. *No "locked-in" source of supply.* TOA members are not "locked-in" to one single source of supply or one single laboratory (Dr. Riley, 12; Dr. Shannon, 16; McGuire and Moore contracts). The examining optometrist loses control over quality of lens fabrication when he cannot threaten to quit his laboratory because of poor quality.

A concrete written example of the dangers of a locked-in source of supply is exemplified by the February 15, 1961 letter from Dr. C. T. Shropshire to Lee Optical local offices. Lee instructed their employee optometrists *not* to give pescriptions for certain types of lenses, even if needed or requested by the patient. (Dr. Riley, 79-94).

h. *Verification of lenses.* TOA members are more likely to verify lenses after they return from the laboratory because they are their own boss and are under less time pressure (Dr. Waldman, 73-75; Dr. Shannon, 17-19). Dr. Shannon testified that a correct examination and a correct prescription is useless if the lens prescription is filled incorrectly.

i. *Strong doctor/patient relationship.* TOA members are more apt to maintain quality care because of a strong doctor/patient relationship unlike commercial optometrists (Dr. Riley, 10; Dr. Shannon, 20). When there is no strong doctor/patient relationship and the doctor's identity remains relatively anonymous, the optometrist logically feels less responsible and less fearful of repercussions from the patient's dissatisfaction.

On the basis of this evidence that TOA members are more likely to emphasize and render the highest quality of eye care, the Legislature had a rational basis for enacting §2.02.

4. *The third rational basis is that TOA members are more likely than non-TOA members to enforce the Texas Optometry law.* Historically, TOA was responsible for the Legislature's adoption of the first Optometry

Act in the early 1900's; (Dr. Riley, 12). TOA has been heavily involved in legislative efforts to up-grade the quality of eye care (Dr. Riley, 12).

In contrast, commercial segments of optometry, represented primarily by Lee Optical and Texas State Optical, have been on the other side of the coin in the courthouse for years, contesting the validity and constitutionality of board rules, board statutes, and board enforcement of those rules and statutes. A summary of those many lawsuits and their lack of success is contained in the appendix hereof.

The lawsuits show a consistent history of commercial optometry's repeated attempts to stymie board enforcement of the optometry laws. Two of the most recent lawsuits involve (1) the commercialists' attempt to declare the continuing education statute unconstitutional, and (2) the commercialists' attempt to invalidate a Board memorandum opinion prohibiting optician signs from overlapping an optometrist's office.

The legislature's rationale of law enforcement is further buttressed by the fact that many of the commercialists have been philosophically opposed to the professional responsibility rule of the Optometry Act (§5.13). This is evidenced by commercial optometry's repeated efforts to destroy it by repeal or by litigation. The summary of optometry cases in the appendix shows these attempts. One of the most significant examples of the commercialists' disregard for the law occurred prior to the 1969 enactment of the current law when Drs. Rogers, Geller and Shropshire attempted to repeal the professional responsibility board rule in 1968 without a

quorum of the Board present. At such meeting, Dr. Rogers was also elected president of the Board without a quorum. (Dr. Rogers, 78-79, 80-82, second deposition).

On the basis of the evidence presented to the court of the history of commercial optometry's opposition to the Texas Optometry Law and of TOA's support of the Texas Optometry Law, the court correctly concluded that the Legislature could have determined that TOA members are more likely to enforce the optometry laws as written by the Legislature. As such, the Legislature had a rational basis for enacting §2.02.

5. *The Legislature was actually aware of these rational bases for §2.02.* The foregoing rationales for §2.02 in the 1969 Optometry Act were not "created" for this lawsuit. Quite the contrary. All of these arguments were asserted by members of TOA in the 1968 legislative election and in the 1968 Texas Senate battle over the appointments of Dr. Dan Geller and Dr. C. T. Shropshire to the Texas Optometry Board. Drs. Geller and Shropshire (both associated with Lee Optical) had been appointed by Governor John Connally in late 1967. TOA members fought their confirmation with the facts and arguments set forth earlier in this brief. This information was actually communicated to the members of the Texas Senate. This was presumably one of the reasons why neither optometrist was confirmed by the Senate (Dr. Riley, 34).

These arguments were also communicated to the candidates in the Texas House and Senate legislative races in 1968. (Dr. Riley, 41-50). Lastly, TOA members

all over the state of Texas argued these facts successfully with the members of the Texas House and Senate during the passage of the 1969 Optometry Act (Dr. Riley, 80-101). Part and parcel of these arguments to the legislature was the fact that commercial optometrists were not members of the Texas Optometric Association. (Dr. Riley, 31-34).

On the basis of the foregoing analysis, the lower court was justified in finding that §2.02 was founded on a rational basis.

D. *Reply to Dr. Rogers' new Equal Protection/ First Amendment argument.* In the light of the overwhelming evidence presented to the lower court that there were many rational reasons for the enactment of §2.02, Appellant Dr. Rogers now seeks to shift his challenge from an arbitrary classification argument to a free speech argument. In his Jurisdictional Statement to this Court, Dr. Rogers asserts that §2.02 denies him free speech and the right to association.[4] Dr. Rogers never clearly specifies how his free speech is inhibited nor how his associational rights are infringed by the requirement that a majority of the Optometry Board belong to TOA.

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[4]So far as Appellee can determine, the issue of whether §2.02 violates Dr. Rogers' first amendment rights was not raised in this cause until Dr. Rogers filed his Jurisdictional Statement before this Honorable Court. Appellant, Senior Citizens, has asserted the effect of §2.02 on *their* first amendment rights, but, so far as Appellant TOA can determine, Dr. Rogers has never before asserted that *his* first amendment rights were violated by §2.02. This question was not pleaded, briefed or argued in the court below and there are serious doubts as to whether it is properly before this Court.

Indeed, Dr. Rogers is himself a member of the Optometry Board. His freedom to serve on the Board has not been impaired. And, as active as Dr. Rogers is in espousing the cause of commercial optometry, it is difficult to see any way that §2.02 has inhibited his right to make his opinion known.

Dr. Rogers bases his first amendment attack of §2.02 on the assertion that a TOA-dominated Board might use advertising "as the trigger that prompts them to investigate an optometrist" thereby having a chilling effect on the right to advertise. Such an assertion is nothing more than speculation based on an erroneous assumption that Optometry Board members, who are sworn to uphold the laws, will attempt to circumvent the law by harassing advertising optometrists. This Court would be setting a dangerous precedent if it were to strike down a statute because persons appointed to a board under that statute *might* abuse their power and *might* unjustly harass persons who advertise which, in turn, *might* have a chilling effect on advertising. Dr. Rogers' fears are so speculative that is doubtful they would be ripe for review even if they were justifiable fears. Similarly, because they are so speculative, it is doubtful that Dr. Rogers could show that he has been significantly harmed enough to have standing to present that argument before this Honorable Court.

Dr. Rogers has not shown that his first amendment rights are substantially violated by §2.02 and therefore his equal protection challenge based on the first amendment raises no question which is substantial enough to warrant further consideration by this Court.

## II. THE THREE-JUDGE FEDERAL COURT CORRECTLY HELD THAT §2.02 DOES NOT DEPRIVE APPELLANT ROGERS OF DUE PROCESS OF LAW.

A. *Section 2.02 is not invalid under a theory of substantive due process.* Dr. Rogers asserts that §2.02 is unconstitutional under the doctrine of substantive due process in that §2.02 allegedly creates "an irrebuttable presumption that non-TOA members are less qualified to serve on the Board than TOA members."

The court below properly rejected such reasoning, noting that the cases cited as supporting authority by Dr. Rogers all involved fundamental rights which are more stringently protected than non-fundamental rights. The court held that in this case, as in other non-fundamental rights cases which involve state regulation of economic matters, the rational basis test of *New Orleans v. Dukes,* supra, and *Williamson v. Lee Optical,* supra, is to be applied. Applying this rational basis test, the court found that the Legislature clearly had a rational basis for enacting §2.02. (Previously discussed in Part I of this Motion).

The lower court made a further finding concerning the irrebuttable presumption argument that has very important ramifications. It found that, in any event, §2.02 "does not conclusively deny any person a board seat." 438 F.Supp. 428, 433. In other words, unlike any of the other irrebuttable presumption cases, §2.02 does not irrebuttably and absolutely deny a board seat to non-TOA members. A non-TOA member may still serve on the Optometry Board. This is graphically demon-

strated by the fact that Dr. Rogers, a non-TOA member, is currently on the Board.[5]

Since fundamental rights are not substantially deprived by §2.02 and since §2.02 does not conclusively prohibit any optometrist from serving on the optometry board, the three-judge court below was correct in finding that §2.02 is not invalid under the theory of substantive due process.

B. *Section 2.02 does not violate Dr. Rogers' right to procedural due process.* Dr. Rogers next asserts that §2.02 is invalid under a theory of procedural due process in that the Optometry Board, under §2.02, would be inherently biased. Dr. Rogers relies heavily on the reasoning in *Wall v. American Optometric Association, Inc.*, N.D. Georgia 1974 (3-Judge Court) 379 F. Supp. 175, aff'd 419 U.S. 888 (1974), and *Gibson v. Berryhill*, 411 U.S. 564 (1972). He asserts that because the Board has a majority of TOA members, the Board is inherently biased against non-TOA members, and therefore §2.02 is unconstitutional as depriving Dr. Rogers of procedural due process.

The lower court correctly overruled Dr. Rogers' contention citing the language of *Wall* that, "there is no federal constitutional requirement to the effect that legislators and rule makers must be free of bias or interest" 438 F. Supp. 428. The three-judge court further

[5]In fact, since Dr. Rogers is currently sitting on the Board, it is doubtful, once again, that he has standing to raise this substantive due process irrebuttable presumption argument.

pointed out that the case at bar is readily distinguishable from both *Wall* and *Gibson* in that:

(1) Those cases were brought *after* the optometry boards in question had brought charges against the optometrist plaintiffs, and therefore they speak only to the due process issues which surround disciplinary adjudications.

(2) In those cases the board had rule-making power which they had exercised, while in the instant case the Texas Board has no rule-making power to enforce what the legislature has mandated; and

(3) In *Wall* and *Gibson* all members of those boards were members of the state optometric association, while in the case at bar one-third of the Board is composed on non-TOA members.

The court was correct in rejecting Dr. Rogers' due process challenge. The *Wall* and *Gibson* cases heavily relied on by Dr. Rogers involved a court determination of *actual bias* of particular board members who were seeking to enforce the law against commercial optometrists. The instant case did not arise out of a specific disciplinary proceeding and, consequently, the question of actual bias has not been raised. Instead, Dr. Rogers asserts that the TOA members of the Board must be *constructively presumed to be biased*, and that it must be constructively presumed that their bias is so pronounced as to render every action taken by the Board invalid. Dr. Rogers' reasoning is flawed in two significant areas:

(1) Mere membership in a professional organization does not inherently bias a Board member. Individual circumstances vary from person to person and bias in any one individual must be proven as to that individual.

(2) Even if bias of some sort were to be presumed, the degree of bias would vary from person to person and from case to case. In many cases some degree of bias might be present, but unless the bias is of such a degree as to substantially impair fair adjudication, it may be discounted.

Lawmakers and judges at all levels face the problem of bias everyday. They are aware that bias can only be determined on a case by case, person by person basis. Nonetheless, Dr. Rogers asks this Court to declare §2.02 unconstitutional on the basis that in some unspecified case in the future, in which the nature of the case and the parties are not yet known, and in which the identities of the Board members are also unknown, a TOA dominated board might be biased toward the parties. This Court should not declare §2.02 unconstitutional on such a basis.

If this Court were to accept Dr. Rogers' argument, it could effectively mean that any board, whatever its make up, would be constitutionally invalid because of inherent bias. Under Dr. Rogers' argument, membership affiliations, alone, are determinative of Board constitutionality. Where does this argument lead us if, for instance, the AOA affiliation requirement were invalidated and the Governor continued to appoint four

TOA members and two non-TOA members to the Board? Under Dr. Rogers' theory, the Board would still be unconstitutional because the majority TOA members must be presumed biased. Or the Governor might appoint four commercial optometrists who are not members of TOA and two professional optometrists who are members of TOA. Is the Board's make-up then to be unconstitutional because there is a majority of commercial optometrists on the Board and such majority is presumed inherently biased against professional optometry?

Membership affiliation alone does not render a person biased. Bias varies from case to case. To render a statute unconstitutional on the basis of presumed "inherent" bias will open the door to challenges of almost every statute which prescribes the qualification for members of governmental boards.

The simple truth, recognized by the court below, is that bias is something that has to be actually proven in a particular proceeding. It cannot be *assumed* in a constitutional sense. It should be noted that in both the *Wall* and *Berryhill* cases, bias was not assumed and was not an automatic result of the organizational ties of the board members. In the *Wall* case, it was especially clear that organizational affiliations did *not* render the Alabama Optometry Board *inherently* biased. The Court concluded that the Board's actions in *adopting* a rule against corporate practice was valid and was not subject to attack for pecuniary bias. The Court's objection went only to the Board's bias (proven at trial) in *enforcing* the rule. Logically, if organizational affiliations had been sufficient to make the Alabama Board

inherently biased as a matter of law, all actions of the Alabama Board would have been unconstitutional, including the *adoption* of the corporate practice rule as well as the enforcement thereof.

The court below correctly concluded that bias must be determined on a case by case basis and that it is not to be presumed. Since this case did not arise under circumstances in which actual bias in a specific adjudication is alleged, the Court properly found that §2.02 is not invalid under a theory of procedural due process.

## III. THE THREE-JUDGE FEDERAL COURT WAS CORRECT IN FINDING THAT §2.02 DOES NOT INFRINGE UPON APPELANT SENIOR CITIZENS' FIRST AMENDMENT RIGHTS TO RECEIVE COMMERCIAL INFORMATION

Appellant Senior Citizens originally challenged §2.02 as an unconstitutional infringement on their First Amendment right to consumer information. This challenge was based on the theory that a board with four TOA members was more likely to enforce the anti-advertising laws then in effect, and thereby more likely to deprive them of their rights.

At the time this suit was brought be Senior Citizens, §5.09 of the Optometry Act prohibited price advertising by optometrists. In this same lawsuit below, appellant Senior Citizens challenged that section as being an unconstitutional infringement on its First Amendment right to consumer information. In the light of this Court's decision in *Bates v. State Bar of Arizona* _____, 97 S. Ct 2691, 53 L.Ed.2d 810 (1977), the

three-judge court below determined that §5.09 is unconstitutional and enjoined its enforcement. No appeal has been taken from that part of the decision below.

After the court decision permitting price advertising by optometrists, the three-judge court below correctly determined that Senior Citizens' First Amendment challenge of §2.02 was mooted. The Optometry Board was enjoined from enforcing the prohibition on price advertising and as such the composition of the Optometry Board became irrelevant to Senior Citizens' First Amendment claims. Under the law as it now stands, optometrists may price advertise and Senior Citizens is not deprived of its right to such information.

However, by this appeal Senior Citizens urges that, despite the new status of the laws, Senior Citizens is still deprived of its First Amendment right to receive commercial information. Its reasoning follows these lines: Section 2.02 requires the Optometry Board to be composed of at least four TOA members. In the pre-*Bates* days, TOA members pressed to enforce the law that was then on the books prohibiting price advertising. Because TOA members enforced §5.09 in the days before it was declared invalid, Senior Citizens fears that the TOA members on the Board *might* ignore the Federal Court order and *might* attempt to enforce §5.09 anyway, either directly or indirectly by harassment of advertising optometrists. Senior Citizens argues that *if* the TOA members do this it *might* have a chilling effect on the optometrists who advertise. Therefore Senior Citizens *might* not receive all of the consumer information they might otherwise have received. Senior Citizens argues

therefore, §2.02 is unconstitutional because it is an unwarranted infringement upon Senior Citizens' right to receive information.

This contention is based upon little more than speculation of what might occur. In fact, Senior Citizens' analysis of their harms consists of one speculation compounded by another. Senior Citizens has shown no harm it has actually suffered, and has shown no likelihood of suffering future harm.

Furthermore, Senior Citizens' bases its analysis upon several erroneous assumptions. The most fatal assumption is that the TOA members of the Texas Optometry Board will seek to undermine the three-judge court's decision on price advertising by optometrists. Members of the Optometry Board are sworn to uphold the law. To assume that they will do the contrary is to accuse the members of the Board of violating their oaths of office, and to argue that the Board itself is unconstitutional because the members thereof *might* not enforce the law they are sworn to enforce is, to say the least, extremely tenuous.

On top of these unwarranted assumptions, Senior Citizens asserts that there *might* be a chilling effect on advertising, and that that *might* limit their access to optometrists prices. Those speculations built upon erroneous assumptions fall far short of the substantial nature of questions which should be heard by this Honorable Court.

The three-judge court below correctly concluded that Senior Citizens' first amendment challenge of §2.02 was

mooted when the prohibition on price advertising was invalidated. Furthermore, even if the questions were somehow deemed not to be moot, the contention that §2.02 deprives Senior Citizens of their right to commercial information is so insubstantial as to warrant no more of this Court's time.

## PRAYER

On the basis of the foregoing analysis, Appellee Texas Optometric Association, Inc. respectfully urges that this Honorable Court dismiss this appeal or affirm the judgment of the lower court with respect to this appeal.

Respectfully submitted,

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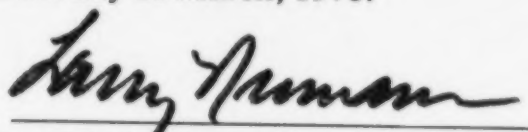
**Certificate of Service**

I hereby certify that a true and correct copy of Appellant TOA's Motion to Affirm or Dismiss has been deposited in the U.S. Mail, Certified Mail, Return Receipt Requested, addressed to Robert Q. Keith, attorney for Dr. N. Jay Rogers, 1400 San Jacinto Building, Beaumont, Texas 77701, Brian R. Davis, attorney for W. J. Dickinson, individually and as President of the Texas Senior Citizens Association, Port Arthur, Texas Chapter, 408 First Federal Plaza, 200 E. 10th Street, Austin, Texas 78701, John G. Tucker, attorney for Dr. E. Richard Friedman, Dr. John B. Bown, Dr. Hugh A. Sticksel, Jr., Dr. John W. Davis, Dr. Sal Mora, individually, P.O. Box 1751, Beaumont, Texas 77704, Dorothy Prengler, Assistant Attorney General of Texas, attorney for Dr. E. Richard Friedman, Dr. John B. Bowen, Dr. Hugh A. Sticksel, Jr., Dr. John W. Davis, and Dr. Sal Mora, in their official capacity as members of the Texas Optometry Board, Supreme Court Building, P.O. Box 12548, Austin, Texas 78711, and Victor J. Rogers, II, 3434 One Allen Center, Houston, Texas 77002, on this the 20th day of March, 1978.



LARRY NIEMANN

# APPENDIX
# TO
# JURISDICTIONAL STATEMENT

## APPENDIX

### Summary of Past Litigation Involving Attacks On Validity Of Optometry Law

*Broughton v. Pray,* No. 99,567 In the 53rd District Court of Travis County, Texas (1954). Commercial optometrist (Texas Optical) sought to invalidate the first rules adopted by the Board prohibiting assumed name practice, advertising, window displays, etc. The district court held all of the rules valid.

*Rogers v. Pray,* No. D-67812 In the District Court of Jefferson County, Texas (1954). Commercial optometrist (TSO) sued the Board asking $250,000 damages and an injunction from enforcing the Optometry rules. The case was dismissed after three years for want of prosecution.

*Carp v. Texas State Board of Examiners in Optometry,* No. 95843-B In the 44th Judicial District Court of Dallas County, Texas (1954). Commercial optometrists (Lee Optical) sought to enjoin enforcement of all of the optometry rules and sought $2,250,000 in damages. Upon being put to trial, the commercial optometrists took a non-suit and the case was dismissed.

*Shannon v. Baber,* No. 11,325B In the 44th Judicial District of Dallas County, Texas and No. 104,397 In the 126th Judicial District Court of Travis County, Texas (1956). Commercial optometrists (Lee Optical) sued to enjoin enforcement of the basic competence rule, the Corporate Practice rule and the Bait Advertising rule and for $2,500,000 damages. After a venue trial in Dallas County, the case was

transferred to Travis County where the commercial optometrists took a non-suit.

*Kee v. Baber,* 303 S.W.2d 376 Tex. Sup. Ct. (1957). Commercial optometrist (with Lee Optical) challenged validity of Basic Competence Rule, the Corporate Practice Rule, and the Bait Advertising Rule. The Supreme Court upheld the rules.

*Carp v. Texas State Board of Examiners in Optometry,* No. 108,976 In the 126th Judicial District of Travis County, Texas (1958). Commercial optometrist (Lee Optical) sued to enjoin enforcement of the corporate practice rule. The case was dismissed on motion of the Plaintiffs.

*Texas State Board of Examiners in Optometry v. Carp,* 343 S.W.2d 242 (Sup. Ct. Tex. 1961) The Board sued to enjoin a commercial optometrist from permitting his employees to practice optometry without a license. The commercial optometrist cross-claimed seeking to enjoin the Board from enforcing any optometry law against him, including those dealing with advertising and practicing in a non-partitioned office. The Supreme Court ruled for the optometry board and against the commercial optometrist.

*Texas State Board of Examiners in Optometry v. Carp,* 412 S.W.2d 307 (Tex. Sup. Ct. 1967). Commercial Optometrists (Lee Optical owner) sued to have the Professional Responsibility Rule declared invalid. After seven years in court and two trips to the Supreme Court of Texas, the Professional Responsibility Rule was upheld.

*Rogers v. Burton,* 496 S.W.2d 673 (Tex. Civ. App. 1973). Commercial optometrist sued to declare invalid the Board interpretation of the Optometry Act grandfather clause re-

garding an optometrist leasing from an optician . The trial court and appeals court held the interpretation valid.

*Burton v. Rogers,* 504 S.W.2d 404 (Tex. Sup. Ct. 1974). Commercial optometrists (Dr. Rogers, TSO) challenged validity of Board interpretation of §5.09(a) prohibiting optometrists from advertising "reference to price." The case went to the Texas Supreme Court on a venue question which the Commercial optometrists lost.

*Texas Optometry Board v. Lee Vision Center,* 515 S.W.2d 380 (Tex. Civ. App. 1974, Writ ref. n.r.e.). A commercial optometrist (Lee Optical) challenged validity of Board interpretation of §5.09(a), prohibiting optometrists from advertising "reference to price." The Court held Board interpretation of statute was valid and enforceable.

*Rogers v. Friedman et al,* No. B-75-277-CA in the U.S. District Court in Beaumont (1975). Commercial optometrist (TSO) seeks to declare unconstitutional AOA affiliation requirement, trade name prohibition, full disclosure in referrals by optometrists, and price advertising prohibition for optometrists. Case still pending.

*Fried et al v. Sticksel et al,* No. CA-76-0377-G in the U.S. District Court in Dallas (1976). Commercial optometrist (Lee Optical) and TAO (commercial optometry association) sought to declare the continuing education statute unconstitutional. Case dismissed by plaintiffs.

*Shropshire v. Sticksel,* No. CA3-76-1180-G in the U.S. District Court in Dallas (1976). Commercial optometrist (Lee Optical) seeks to declare invalid the Board's memorandum opinion prohibiting optician signs from overlapping an optometrist's office. Case still pending.